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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 166

SAMUEL D. CATES, TRADING AS GLORY BEE PRODUCTS AND GLORY BEE, PETITIONER

v.

JOHN HADERLEIN, AS POSTMASTER OF THE CITY OF CHICAGO, IN THE COUNTY OF COOK AND STATE OF ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court is not reported. The opinion of the Court of Appeals for the Seventh Circuit (R. 119-125) is reported at 189 F. 2d 369.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1951 (R. 126). The petition for

a writ of certiorari was filed on July 2, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the provisions of Section 5 of the Administrative Procedure Act (5 U. S. C. 1001 *et seq.*) are applicable to fraud order proceedings conducted by the Post Office Department.

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act and the mail fraud statutes are set forth in the Appendix.

STATEMENT

Petitioner brought suit to enjoin the Postmaster of the City of Chicago from carrying out the terms of a fraud order issued by the Postmaster General after a hearing (R. 3-12). The district court's dismissal of the complaint was affirmed by the court below (R. 126).

Petitioner, doing business as Glory Bee Products and Glory Bee, was found, after notice and a hearing before the Post Office Department, to be conducting a scheme for obtaining money through the mails by means of knowingly false and fraudulent pretenses (R. 39-49). Petitioner advertised its products, "Glory Bee Fast Luck Brand Incense" and "Incense Number Tablets," by sending printed circulars through the mails (R. 120). Petitioner admitted use of the mails for dissemination

of these advertisements but denied any fraudulent representations (R. 120).

"Fast Luck Brand Incense" consisted of an aromatic oil and coloring in a sawdust base, no different from any ordinary commercial incense (R. 123). Included with each pound of this incense, as a "special gift," was a package of "Number Tablets" composed of an aromatic oil in a charcoal base, containing numbers made of ink saturated with copper sulphate (R. 123). These numbers appeared in the burning incense when the tablets were lighted (R. 123). The incense, lucky numbers, and a container were sold for $5.00 (R. 123).

Petitioner's advertisements and circulars represented the incense as a luck-changing medium and were designed to prey upon superstitious beliefs and ignorance (R. 123). Advertisements contained a heading in large black type which read: "DON'T GIVE UP! LUCK MAY CHANGE FOR YOU INTO POWER AND GLORY!" Small print stated: "Read very carefully—then decide! How you may find Good Fortune, Happiness, according to legend, same as I found it. I was real down—so blue, confused, just couldn't think what to do. Then I learned how Incense could soothe and calm —how it relax me—help me meditate what to do. It seemed like magic the way things got. I want you to know the amazing calming power of this Incense that helped me so much. * * *." (R. 123.)

Numerous testimonials were printed in advertisements as "personal excerpts from users of Glory Bee Fast Luck Brand Incense," which purported to attribute to the use of petitioner's incense such results as better health, improved financial conditions, "power" to meet family obligations, wonderful changes for the better in the family home, the obtaining of profitable employment, improved social power, peace in the home, and acquisition of new "pep." The lucky number tablets also were credited with bringing luck, cheer and good fortune to the user. (R. 123-124.)

The Post Office Department found that petitioner "vouches throughout his advertising literature for the validity of the 'legend' and endorses it as worthy of belief. He misleads his superstitious readers to believe that the 'legend' is reality, and offers for sale the instrumentalities by means of which he shows this has been and can be accomplished. * * * He has composed advertisements well calculated to deceive and defraud the ignorant, the credulous and the superstitious." (R. 62-63.)

The Postmaster General adopted the finding "that such statements materially misrepresent the value of respondent's [petitioner's] incense, its efficacy and the benefits to be derived from use thereof" (R. 63), and concluded that petitioner was "engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises" (R. 49).

In both the district court and the court below petitioner, in addition to challenging the finding of fraudulent use of the mails, contended that the administrative hearing conducted by the Post Office Department did not meet the requirements of the Administrative Procedure Act for an independent trial examiner. Both courts held that the evidence was sufficient to support the finding of fraud. The court below held that the administrative hearing was not required by the postal fraud statutes or the Constitution and, therefore, under *Won Yang Sung* v. *McGrath*, 339 U.S. 33, that the Administrative Procedure Act was not applicable.

Effective July 8, 1951, the Post Office Department provided for the establishment of independent hearing examiners in accordance with Section 5 of the Administrative Procedure Act (17 Fed. Reg. 6623). We have been advised by the Post Office Department that fraud order proceedings hereafter will be conducted before these hearing examiners.

DISCUSSION

The single basis urged for review is that the trial examiner, before whom the hearings were held, did not satisfy the standards of independence of Section 5(c) of the Administrative Procedure Act. It is not argued that the evidence does not support the finding of fraudulent use of the mails, and even a cursory examination of the record will disclose

clear support for the administrative finding (see *e.g.*, R. 15-23).

We do not challenge the applicability of the Administrative Procedure Act to fraud order proceedings of the Post Office Department. Upon the advice of the Attorney General that the decisions of this Court (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33; *Riss & Co.* v. *United States*, 341 U. S. 907) so require, that Department has modified its procedures in such cases so as to comply with the requirements of the Administrative Procedure Act. This deprives the issue presented by petitioner of importance in so far as the future is concerned. In view of this fact, and because the evidence as to petitioner's fraud is plain, this Court may deem it appropriate to deny certiorari, inasmuch as in this case no good purpose would be served by delaying the protection of the public against a fraudulent use of the mails by remanding the case to the Post Office Department for another hearing at which the evidence would be the same.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

APPENDIX

The pertinent statutory provisions are set forth below:

39 U. S. C. 259 provides in part: "The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. * * *"

39 U. S. C. 732 provides in part: "The Postmaster General may, upon evidence satisfactory to him that * * * any person or company is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order * * * and may provide by regulation for the return to the remitters of the sums named in such money orders."

Section 5 of the Administrative Procedure Act (5 U. S. C. 1004) provides:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *
>
> * * * * * *
>
> (c) The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision * * * no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *

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Petitioner,

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JOHN HADERLEIN, AS POSTMASTER OF THE CITY OF CHICAGO, IN THE COUNTY OF COOK AND STATE OF ILLINOIS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY MEMORANDUM AND BRIEF FOR PETITIONER.

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> (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33; *Riss & Co.* v. *United States*, 341 U. S. 907), so require, that Department has modified its procedures in such cases so as to comply with the requirements of the Administrative Procedure Act. * * *"

He explains that

> "Effective July 8, 1951, the Post Office Department provided for the establishment of *independent hearing examiners* in accordance with Section 5 of the Administrative Procedure Act (17 Fed. Reg. 6623). We have been advised by the Post Office Department that fraud order proceedings *hereafter* will be conducted before those hearing examiners." (Italics ours.) *Respondent's Memorandum*, page 5.

As respondent correctly states on page 5 of his *Memorandum* that

> "The single basis urged for review is that the trial examiner, before whom the hearings were held, did not satisfy the standards of independence of Section 5(c) of the Administrative Procedure Act",

which fact he does not deny, he admits the error of the Courts below.

It should be remembered that this Court rightly concluded, in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, (1949):

> "* * * We hold that deportation proceedings *must* conform to the requirements of the Administrative Procedure Act *if resulting orders are to have validity.*" (Emphasis supplied.)

It is petitioner's position herein that failure of the Postmaster General to comply with the requirements of that Act and to grant petitioner the fair hearing required by statute has voided his fraud order, by denying petitioner the due process guaranteed him by the Constitution. Petitioner must be given not only the right to a hearing, but

to a fair hearing before an impartial and independent trial examiner who might not feel the compulsion of drawing doubtful or unreasonable inferences from the evidence adduced.

Respondent's position herein is two-fold: *First*, that the recent action of the Post Office Department in subjecting itself to the requirements of the Administrative Procedure Act, together with its assurance that fair hearings in fraud order proceedings will be granted in the future

> "* * * deprives the issue presented by petitioner of importance *in so far as the future is concerned* * * *." *Respondent's Memorandum*, page 6. (Emphasis supplied),

which completely ignores the fact that the Postmaster General admits that petitioner, and perhaps many others like him, were denied fair hearings in the past, a wrong which this Court can undo by reversing and remanding for a new hearing; and *Second*, that

> "* * * petitioner's fraud is plain, * * *" *Respondent's Memorandum*, page 6,

a violent statement, devoid of support in the evidence, and a question not presently before this Honorable Court.

Both before the Post Office Department and before the Court of Appeals, petitioner urged that his advertisements did not mean what the trial examiner found them to mean. He insisted that they were the same kind of advertisements as those approved by the Court of Appeals in the First Circuit in *Dolan* v. *Hurley*, 283 F. 695, affirmed 297 F. 825, wherein that Court held:

> "Upon a careful examination of complainant's advertisement, I have been unable to discover anything which amounts to a false statement or representation made by her; and my attention has been called to none by the defendant. Many of the so-called testimonials appear absurd and improbable, but apparently the testimonials are genuine.